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In The

Supreme Court of the United States

GREENVILLE WOMEN'S CLINIC;
WILLIAM LYNN, M.D., ON BEHALF OF THEMSELVES
AND THEIR PATIENTS SEEKING ABORTIONS,

Petitioners,

v.

COMMISSIONER, SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL
CONTROL; GOVERNOR OF SOUTH CAROLINA;
CHARLES MOLONY CONDON, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL OF THE
STATE OF SOUTH CAROLINA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state may review, copy and retain abortion patients' complete medical records without protecting those records from public disclosure, and without demonstrating a countervailing public interest for the privacy intrusion.

2. Whether a state may require abortion providers to form professional affiliations with clergy persons, including at least one Protestant.

3. Whether a state may make abortion facility licensing contingent upon the cooperation of area hospitals that are free to deny their cooperation because of opposition to abortion.

4. Whether a state may require abortion providers to comply with regulatory requirements that have no fixed meaning and will be defined by inspectors on a case by case basis.

LIST OF PARTIES

The Petitioners are Greenville Women's Clinic and William Lynn, M.D., on behalf of themselves and their patients seeking abortions.[1]

The Respondents are Commissioner, South Carolina Department of Health and Environmental Control; Governor of South Carolina; and Charles M. Condon, in his official capacity as Attorney General of the State of South Carolina.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Neither of the Petitioners is a publicly-held corporation or a corporation owned by parent corporations.

[1] Charleston Women's Medical Clinic, Inc. ("CWMC") was a plaintiff in this lawsuit but is not a petitioner at this stage in the proceedings. Subsequent to trial, the assets of CWMC were bought by another company, and CWMC no longer exists.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit entered on September 19, 2002, which upheld the constitutionality of South Carolina Code Annotated Regulation 61-12 (2002).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, -- F.3d --, 2002 WL 31928629 (4th Cir. Sep. 19, 2002). A copy of that opinion is reproduced in the appendix at A1-50.[2] The Fourth Circuit's November 8, 2002, Order granting Plaintiffs' Petition for Rehearing *En Banc* is reproduced in the appendix at A61-63. The Fourth Circuit's November 15, 2002, order revoking the November 8, 2002, order and denying Plaintiffs' Petition for Rehearing *En Banc* is reproduced in the appendix at A64-66. The opinion of the United States District Court for the District of South Carolina is unreported. A copy of the district court's slip opinion is reproduced in the appendix at A51-60.

This case was previously before the Fourth Circuit on an earlier appeal. The Fourth Circuit's decision on that appeal is reported at 222 F.3d 157 (4th Cir. 2000). That opinion reversed a decision of the district court reported at 66 F. Supp. 2d 691 (D.S.C. 1999). This Court's denial of certiorari in the earlier appeal is reported at 531 U.S. 1191 (2001).

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on September 19, 2002. A petition for rehearing *en banc* was denied on November 15, 2002, by a five to four vote in favor of granting rehearing, with two judges abstaining. This Court has jurisdiction under 28 U.S.C. §1254(1).

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[2] The appendix to this Petition is cited as "A__".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I, which provides in pertinent part that "Congress shall make no law respecting an establishment of religion ... ."

U.S. CONST. amend. XIV, which provides in pertinent part: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

S.C. CODE ANN. § 44-41-75 (2002), which provides:

> (A) A facility in which any second trimester or five or more first trimester abortions are performed in a month must be licensed by the department to operate as an abortion clinic and must comply with the provisions of Article 3.
>
> (B) The department shall promulgate regulations concerning sanitation, housekeeping, maintenance, staff qualifications, emergency equipment and procedures to provide emergency care, medical records and reports, laboratory, procedure and recovery rooms, physical plant, quality assurance, infection control, and information on and access to patient follow-up care necessary to carry out the purposes of this section.

S.C. CODE ANN. REGS. 61-12 (2002), which is reproduced in the appendix at A67-125.

STATEMENT OF THE CASE

I. Petitioners.

Petitioner Greenville Women's Clinic ("GWC") is a medical practice in Greenville, South Carolina, that is owned and operated by Drs. Buffkin and Campbell, who provide first-trimester abortions and other gynecological services. Petitioner Dr. Lynn is a physician who, during much of the

pendency of this lawsuit, provided first-trimester abortions and other gynecological care in his medical practices in Beaufort and Greenville, South Carolina. Following the trial in this matter, Dr. Lynn closed his Beaufort office because it was no longer economically sustainable. A161. Subsequently, during the course of this appeal, Dr. Lynn also closed his Greenville practice for economic reasons. In both cases, the cost of complying with the Regulation was one of the economic factors leading to the closure. Since closing his Greenville office, Dr. Lynn has been providing abortions to women from South Carolina and elsewhere in another physician's medical practice in a neighboring state.

II. The Regulation.

Prior to 1995, South Carolina only required licensing of physicians' offices and clinics in which second-trimester abortions were performed. In 1995, the South Carolina legislature began requiring licensing of any "facility in which any second trimester or five or more first trimester abortions are performed in a month," and directed the South Carolina Department of Health and Environmental Control ("DHEC") to promulgate regulations for such facilities. S.C. CODE ANN. § 44-41-75 (2002). DHEC subsequently promulgated S.C. CODE ANN. REGS. 61-12 (2002) ("R. 61-12" or "the Regulation"), thirty-seven pages of requirements with which a medical practice must comply in order to obtain a license allowing it to be able to perform five or more first-trimester abortions (or even one second-trimester abortion) per month. Violation of the Regulation, including the failure of a covered facility to obtain a license, is a misdemeanor. S.C. CODE ANN. § 44-7-340 (2002). In addition, a covered facility found to be in violation of the Regulation is subject to suspension or revocation of its license and/or the assessment of a monetary penalty by the Department. R. 61-12 § 103. The Regulation designates each provision as a Class I, II or III violation, and establishes a schedule of penalties, which

range up to $5,000 per day for some violations. *Id.* The regulatory provisions at issue here fall into three categories.

A. Disclosure of Private Medical Information.

Section 102(F)(2) of the Regulation gives DHEC inspectors "access to all ... records" in an abortion facility, including patients' individual medical records, and gives the inspectors "authority to make photocopies of those documents." R. 61-12 § 102(F)(2) ("disclosure provision"). An abortion patient's medical records contain a great deal of personal information, such as the fact that she is undergoing an abortion, her history of past pregnancies and abortions, and her history of past psychological and physical conditions and treatment. Patients' medical records also contain extensive identifying information, such as the patient's "name, address, telephone number, social security number, date of birth, father's and mother's names when patient is a minor, husband's name, and name, address and telephone number of person to be notified in the event of an emergency." R. 61-12 § 401(A)(1). Inspections of an abortion facility and its records may be triggered by a single, anonymous, telephonic complaint to DHEC. A144-145.

The Regulation itself makes no provision for redacting patient names and other identifying characteristics from medical records, nor does it mandate that DHEC officials maintain the records' confidentiality. Moreover, while state law prohibits disclosure of patients' identities in some contexts, it explicitly permits public disclosure of abortion patients' complete medical records in proceedings "involving the licensure or certification of need of the [abortion] facility or licensing proceedings against an employee of the facility." S.C. CODE ANN. § 44-7-310 (2002).

B. Clergy Requirement.

Section 307 of the Regulation requires, *inter alia*, that "[a]rrangements shall be made for consultation or referral services in the specialties of ... clergy ... to be available as

needed." R. 61-12 § 307 ("the clergy provision"). According to DHEC, the clergy provision requires that the physician "make prior arrangements" with these clergy consultants "ahead of time to ensure that [they] [a]re immediately available should the physician wish to refer a patient to them." A143. Thus, as George Moore, the principal drafter of the Regulation and the Director of Outpatient and Home Care in DHEC's Division of Licensing testified, the abortion provider must make advance arrangements for particular clergy to "be on call" to handle patient referrals. A143. Also, according to DHEC, the facility must make those arrangements with clergy of two or three different denominations, at least one of which must be Protestant. A143. DHEC inspectors will then evaluate whether a facility's choice of clergy and clergy arrangements satisfy the Regulation. A143.

C. Delegation of Licensing Authority to Third Parties.

Under §§ 101(J), 205(C)(2), 305(A), and 309(B) of the Regulation, abortion providers must either: (a) have admitting privileges at a local hospital that has successfully sought state certification as an abortion provider;[3] or (b) have a documented transfer arrangement with a local hospital certified as an abortion provider and a written consulting agreement with a physician who has admitting privileges at such a hospital. The Regulation imposes no standards on hospitals' decisions whether to seek certification as abortion providers, nor does it impose standards governing hospitals' admitting privilege determinations.

D. Vague Requirements.

The Regulation subjects abortion providers to penalties not only for failing to comply with the requirements enumerated in the Regulation, but also for acting in any way that is

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[3] In order to become certified as suitable for the performance of abortions, a hospital must itself seek certification from DHEC. S.C. CODE ANN. REGS. 61-16 § 104.

"against the best practices as interpreted by the Department." R. 61-12 § 103(C).[4] These requisite "best practices" are defined by DHEC inspectors on a "case by case basis." A141-142. DHEC inspectors are authorized to cite abortion providers for a Class III violation if they are not in compliance with a best practice defined by a DHEC inspector. A141-142. Physicians may be subject to monetary penalties for "best practices" violations after the first day on which DHEC requires compliance with any enunciated "best practice." R. 61-12 § 103(C).

III. Statement of Facts.

Confidentiality is vital to women seeking abortions because they may face harassment and violence from their partners or others for having decided to undergo an abortion. *See* A133; A128; A130-A132; A162. Consequently, the disclosure provision may force patients to delay their abortions until they can go to a state where their confidentiality will be maintained, to go to an unlicensed provider, or to attempt to self-abort. Each of these alternatives poses serious risks to patient health. A162; A160-161; *see also* A133; A128. Rather, requiring patients to give their husbands' names for their medical records may cause women to give their physicians false information about their identities, thus impairing their physicians' ability to protect their health. A160. The disclosure provision also forces abortion providers to choose between violating the Regulation and violating their duty of confidentiality to their patients. A139; A156-159; A133-134; A129-130; A132. Notably, anti-abortion demonstrators have in the past obtained and publicly distributed potentially-

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[4] Section 103(C) states that "Class III violations are those that are not classified as Class I or II in these regulations or those that are against the best practices as interpreted by the Department." R. 61-12 § 103(C). The first day of a Class III violation does not call for a monetary penalty; after that time, Class III violators are subject to monetary penalties ranging from $100 to $5,000. R. 61-12 § 103(F).

identifying, confidential information that a South Carolina abortion provider submitted to DHEC. A134-138; A147-152 (indicating patient's town, county and zip code of residence, marital status, age, race, ethnicity, and education level).

IV. Procedural Background

In 1996, the Plaintiff-Petitioner abortion providers ("Plaintiffs") filed this suit for declaratory and injunctive relief on behalf of themselves and their abortion patients, claiming that the Regulation: (1) denies Plaintiffs and their patients equal protection of the laws; (2) deprives Plaintiffs' patients of their right to privacy; (3) violates patients' rights to informational privacy by breaching the confidentiality of their medical information; (4) violates the Establishment Clause; (5) violates Plaintiffs' right to due process by delegating to third parties unbridled veto power over facility licensing; and (6) is void for vagueness. After a six-day bench trial, the district court granted judgment to Plaintiffs on their equal protection and privacy claims and permanently enjoined enforcement of the Regulation. *Greenville Women's Clinic v. Bryant,* 66 F. Supp. 2d 691 (D.S.C. 1999). The district court declined to reach Plaintiffs' remaining claims.

Defendants-Respondents ("Defendants" or "the State") appealed the judgment to the Fourth Circuit, which reversed, upholding the Regulation in its entirety. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 175 (4th Cir. 2000). This Court subsequently denied Plaintiffs' petition for certiorari without comment. *Greenville Women's Clinic v. Bryant*, 531 U.S. 1191 (2001). On remand, the district court granted Plaintiffs judgment on their informational privacy claim, but dismissed Plaintiffs' vagueness, unlawful delegation and Establishment Clause claims. *Greenville Women's Clinic v. Bryant*, No. 6:96-1898 slip op. (D.S.C. Aug. 31, 2001). The parties filed cross-appeals to the Fourth Circuit, which, over the dissent of Judge King, reversed the district court's grant of judgment to plaintiffs on their informational privacy claim

and affirmed the district court's dismissal of plaintiffs' three other claims. *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, -- F.3d --, 2002 WL 31928629 (4th Cir. Sep. 19, 2002).

Plaintiffs filed a Petition for Rehearing *En Banc*, which the Fourth Circuit granted on November 8, 2002. A61-63. However, one week later, the Fourth Circuit issued an order vacating its prior order as "improvidently granted." A64-66. The November 15, 2002 order stated that five judges voted in favor of granting the petition, four voted against and two abstained, and that because Plaintiffs had failed to secure a majority of all of the active judges on the court, the petition was denied. A64-66.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Contributes to a Conflict Among the Circuits as to the Constitutional Protection for Individuals' Informational Privacy.

In *Whalen v. Roe*, this Court held that it did not "decide any question which might be presented ... by a system [for disclosure of confidential information] that did not contain comparable security provisions." 429 U.S. 589, 605-06 (1977). This case presents the question left open by this Court in *Whalen*.

As explained earlier, *see supra* at 4, the disclosure provision authorizes DHEC to review and copy abortion patients' unredacted medical records without protecting the confidentiality of the patients' identities or medical information. The district court invalidated this provision because defendants failed to justify their intrusion into patients' private medical records. A58-59. The majority below ("majority") reversed, applying rational basis review to the provision, and upholding it despite recognizing that state law authorizes public disclosure of abortion patients' medical records in state licensing proceedings. A23-25.

The majority's ruling contributes to a growing conflict among the circuits as to the existence of a constitutional right to informational privacy and the appropriate analysis for claims made under that right. The decision is also unprecedented in upholding a state's intrusion into private information where the government is actually authorized to publicly disclose that information. Certiorari should be granted to resolve these conflicts.[5] *See* SUP. CT. R. 10(a), (c).

A. South Carolina Law Undisputedly Authorizes Disclosure of Abortion Patients' Medical Records in Licensing Proceedings.

It is undisputed that South Carolina law authorizes DHEC to disclose abortion patients' complete medical records, including patient-identifying information, in proceedings "involving the licensure or certification of need of the [abortion] facility or licensing proceedings against an employee of the facility." S.C. CODE ANN. § 44-7-310 (2002). While the State and majority below have cited to state laws offering some measure of protection against disclosure in other contexts,[6] they concede that state law

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[5] At the very least, the questions of whether a state may obtain individuals' medical records without protecting them from public disclosure and whether an intrusion into informational privacy must be justified by countervailing state interests are important questions of federal constitutional law that should be resolved by this Court. *See* SUP. CT. R. 10(c). *Cf. Reproductive Servs., Inc. v. Walker*, 439 U.S. 1307, 1308 (Brennan, Circuit Justice 1978) (stating that "[t]he question sought to be raised by applicant — whether the names of abortion patients can be obtained by discovery for use in a civil suit against a person or clinic performing abortions where, as here, the parties have not agreed to a protective order to ensure the privacy of those patients — is a serious one. If this question were in fact presented by this case, I am of the view that four Members of this Court would vote to grant certiorari to hear it.").

[6] The majority and the State first rely on Section 44-7-310 of the South Carolina Code, which prohibits public disclosure of patient identifying information but includes the exception described above, which explicitly permits disclosure of such information in licensing proceedings. The

authorizes DHEC to disclose patients' medical records in public licensing proceedings. *See* S.C. CODE ANN. § 1-23-600(A) (2002) (providing that administrative hearings are generally open to the public); A24 (acknowledging that there is an exception to confidentiality protections in "a proceeding involving licensure"). Indeed, the State has admitted that its justification for authorizing inspectors to copy patients' medical records is to allow DHEC to preserve those records as possible evidence to be submitted in administrative hearings. A145.[7]

Having acknowledged that state law fails to prohibit DHEC from disclosing patients' medical records in licensing

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majority and the State also cite Section 44-7-315 of the South Carolina Code, which actually *requires* DHEC to disclose publicly, upon request, any information it has received from an abortion facility. The only exception is that DHEC may not disclose "the identity of individuals present in the facility." S.C. CODE ANN. § 44-7-315. This exception, however, applies only to public information requests, not to licensing proceedings where abortion patients' identities may be disclosed. Moreover, even where the exception applies, it fails to protect patient confidentiality because it does not indicate whether it protects the identities of individuals regularly present in the facility (such as staff), individuals present at the time of the DHEC visit, or something else. A33-34 (King, J., dissenting). It also fails to indicate whether it prohibits disclosure of *potentially*-identifying information such as a patient's address, race, age, and marital status. As previously noted, anti-abortion activists have already obtained and distributed such potentially-identifying patient information submitted to DHEC by abortion facilities. *See supra* at 6-7. Third, the majority and the State refer to various laws that require abortion providers and their staff to maintain patient confidentiality, but impose no duty on DHEC or its inspectors. *See* S.C. CODE ANN. § 44-41-60; R. 61-12 §§ 204(F)(3), 209, 402. Because any abortion patient's medical records may ultimately be disclosed in a licensing proceeding, these protection in other contexts offer women little in the way of confidentiality protection.

[7] The only other basis that the State has asserted for the disclosure provision is a desire to spare inspectors the administrative burden of staying at abortion facilities long enough to review the records there. A145.

proceedings, the majority asserted that the courts would prevent such disclosure in accordance with constitutional requirements. A25. The majority based this assertion on a provision of state law that governs enforcement proceedings under the South Carolina Woman's Right to Know Act. S.C. CODE ANN. § 44-41-360 (2002). In such enforcement actions, the court must determine whether to protect an abortion patient's identity from public disclosure. S.C. CODE ANN. § 44-41-360. The Woman's Right to Know Act has no application to this case, nor to the administrative licensing hearings that are at issue here. *See* S.C. Code. Ann. § 44-41-310 *et seq.*[8] Thus, the issue in this case is not whether public disclosure of information obtained under the Regulation is possible: that disclosure is explicitly authorized by statute. The question is whether the State's gathering of highly confidential information in these circumstances is constitutional.

B. There is a Split Among the Circuits as to How to Approach Informational Privacy Claims.

In *Whalen v. Roe*, this Court declared that an individual's right to privacy includes an interest in "avoiding disclosure of personal matters." 429 U.S. 589 at 599. In analyzing the constitutionality of a statute requiring physicians and pharmacists to report prescriptions of certain controlled drugs, this Court balanced the state interest served and the means the state employed against the threat posed to individual privacy. *Id.* at 594-98. This Court upheld the challenged statute, determining that the degree of intrusion imposed on privacy was justified because: (1) the reporting requirement addressed a "vital" state interest and "could reasonably be expected" to serve that interest, *id.* at 597-598; (2) public disclosure of the confidential information was expressly pro-

[8] This Court has previously granted certiorari to correct the improper construction of state law by a court of appeals where, as here, the court's construction flatly contradicted the law's explicit provisions. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996).

hibited, *id.* at 594; and (3) New York employed extensive safeguards, including criminal penalties, to prevent unauthorized disclosure of the confidential information, *id.* at 594-95. *See also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 458-59 (1977) (applying a comparable balancing test to an informational privacy claim). With respect to this last factor, *Whalen* emphasized that "[t]he right to collect and use [personal information] for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *Whalen*, 429 U.S. at 605.[9]

Since *Whalen*, the courts of appeals have reached conflicting conclusions about whether a constitutional right to informational privacy exists at all. The majority of circuit courts — namely, the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits — have interpreted *Whalen* as establishing a constitutional right against disclosure of personal information. *See Planned Parenthood v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002); *Denius v. Dunlap*, 209 F.3d 944, 956-57 (7th Cir. 2000); *James v. City of Douglas*, 941 F.2d 1539, 1543-44 (11th Cir. 1991); *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435-36 (10th Cir. 1981); *United States v. Westinghouse Elec. Co.*, 638 F.2d 570, 578 (3d Cir. 1980); *Plante v. Gonzalez*, 575 F.2d 1119, 1132-36 (5th Cir. 1978). The Fourth Circuit held similarly prior to announcing the decision below. *See Walls v. City of Petersberg*, 895 F.2d 188, 192 (4th Cir. 1990).

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[9] The *Whalen* Court dismissed the alleged "chilling" effects of the statute there on the grounds that the State could permissibly prohibit entirely the use of controlled drugs. 429 U.S. at 602-03. In this case, the impact of the disclosure provision cannot be so dismissed, as the states cannot prohibit abortion. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (reaffirming that the right to abortion is a constitutionally protected element of a woman's fundamental liberty interest).

In analyzing informational privacy claims, these circuits, like the *Whalen* Court, have applied a balancing test to determine whether the public need for the particular disclosure outweighs the individual's privacy interest.[10] *See, e.g.*, *Lawall*, 307 F.3d at 790; *Denius*, 209 F.3d at 956-57; *James*, 941 F.2d at 1544; *Barry*, 712 F.2d at 1559-61; *Lichtenstein*, 660 F.2d at 435; *Westinghouse*, 638 F.2d at 578; *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981). Prior to announcing the decision below, the Fourth Circuit also applied this balancing approach. *See Walls*, 895 F.2d at 192, 194.

These courts have reached conflicting conclusions, however, about the type of state interest that is needed to justify a privacy intrusion. Some circuits require a compelling state interest, *see, e.g., Paul P. v. Verniero*, 170 F.3d 396, 402 (3d Cir. 1999); *Lichtenstein*, 660 F.2d at 435-36, while others accept a legitimate interest if it sufficiently justifies the intrusion at issue, *see, e.g. Denius*, 209 F.3d at 956-57; *Fadjo*, 633 F.2d at 1176. Prior to issuing the decision below, the Fourth Circuit upheld privacy intrusions only upon a showing of "a compelling governmental interest in disclosure." *Walls,* 895 F.2d at 192.

The circuits recognizing a right to informational privacy also require protections against public disclosure before upholding a privacy intrusion.

See, e.g., Nixon, 433 U.S. at 458-59; *Am. Fed'n of Gov't Employees v. United States Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 793 (D.C. Cir. 1997); *Barry*, 712 F.2d at 1561-63; *Lichtenstein*, 660 F.2d at 436; *Westinghouse*, 638 F.2d at

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[10] The Third Circuit, for example, considered the following factors in its balancing: "the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access." *Westinghouse*, 638 F.2d at 578.

579-80; *see also, e.g., Denius*, 209 F.3d at 956-57 (rejecting claim of qualified immunity where release of medical information was authorized); *Bloch v. Ribar*, 156 F.3d 673, 684-86 (6th Cir. 1998) (holding that plaintiff stated informational privacy claim where the state disclosed the personal information it obtained); *James*, 941 F.2d at 1544 (same); *Fadjo*, 633 F.2d at 1175 (same).

These decisions stand in sharp contrast to the decisions of the Sixth, Eighth and District of Columbia Circuits, which have all questioned the existence of any constitutional right to informational privacy. As the Sixth Circuit has explained:

> Absent a clear indication from the Supreme Court, we will not construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure. –

J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981). Accordingly, the Sixth Circuit will only apply a balancing test to an informational privacy claim if the alleged privacy right implicates a fundamental liberty interest, *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998), or if the state has actually disseminated private information to the public, *Bloch*, 156 F.3d at 684-86. The Eighth Circuit, for its part, has held that the disclosure of personal information only violates an individual's constitutional rights if it is "either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant breech of a pledge of confidentiality which was instrumental in obtaining the personal information." *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993). The D.C. Circuit has applied a balancing test to informational privacy claims, but has also directly questioned the existence of any such constitutional right:

> We begin our analysis by expressing our grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information. Were we the first to confront the issue we would conclude with little difficulty that such a right does not exist, but we do not, of course, write on a blank slate. The Supreme Court has addressed the issue in recurring dicta without, we believe, resolving it.

Am. Fed. of Gov't Employees, 118 F.3d at 791-94. The decision below significantly adds to this fray by moving the Fourth Circuit from the position held by the majority of circuits to the minority position of requiring nothing more than a rational basis to justify significant privacy intrusions.

C. The Circuit Courts' Varying Approaches to Informational Privacy Claims Lead to Very Different Results.

The majority applied rational basis review to the disclosure provision and upheld it on the grounds that it was "meaningful to the overall health and safety purposes of Regulation 61-12," and that personal information was adequately protected from disclosure, despite DHEC's authority to disclose that information in licensing proceedings.[11] A23-

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[11] Oddly, the majority's analysis of the challenged disclosure provision focuses almost entirely on the Regulation's record keeping and reporting requirements, which Plaintiffs did not challenge. Similarly, the majority refers to the National Abortion Federation's ("NAF") standards governing physicians' maintenance of patient records and reporting of statistical information despite the fact that Plaintiffs challenge no such provisions. A19. The majority fails to mention the NAF standard governing disclosure of patient records, which states in part that "[e]very woman has the right to expect her privacy will be respected and confidentiality of her records protected ... if a member of the facility receives a subpoena for a woman's records, action must be taken to prohibit release of the records without the woman's consent." A157. Thus, the majority appears to

25. The majority never addressed the intensely personal nature of the information available to DHEC, nor did it discuss in what way the disclosure provision could conceivably serve a legitimate state interest. Nor did the majority inquire whether any such state interest is sufficiently important to justify the degree of privacy intrusion imposed by the provision, or whether there would be an adequate fit between the scope of information subject to disclosure under the Regulation and the alleged interest to be served. Finally, the majority failed to ensure that safeguards exist to prevent public disclosure of the confidential information. Had the majority applied the balancing test utilized by the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits, and thus considered each of these factors, the majority would have been compelled to strike down the disclosure provision.

First, the degree of intrusion on the patients' privacy interests here is substantial. *See Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (policy of drug testing urine of pregnant women was substantial invasion of privacy where, *inter alia*, the results were not protected from unauthorized dissemination to third parties). The unredacted medical records of Plaintiffs' patients — which reveal such matters as the patients' identities, abortion decisions and past medical histories — are undoubtedly highly personal and within the patients' reasonable expectation of privacy. *See Ferguson*, 532 U.S. at 78 (holding that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent"); *Westinghouse*, 638 F.2d at 577 (holding that "medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials

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have upheld the disclosure provision on the basis of its analysis of other, non-material provisions of the Regulation.

entitled to privacy protection"). This Court has long recognized that a woman has a right to confidentiality with respect to her abortion decision. As the *Thornburgh* Court explained, "[t]he decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 766 (1986); *see also Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny....").

Second, these weighty privacy concerns cannot be justified by any legitimate state interest. As the dissenting judge below explained:

> The only justification offered by the State is that such information is needed in order to investigate complaints against abortion clinics. However, the State has failed to demonstrate a need to contact patients in such situations. In fact, complaints involving compliance with issues such as structural building requirements and staff qualifications could be fully investigated by the State without contacting the female patients. And on issues involving patient care, the affected patients would most likely consent to the disclosure of their identity.

A31-32 (King, J., dissenting). Indeed, the Regulation's compromise of patient confidentiality directly threatens the State's purported interest in the health of abortion patients. *See supra* at 6. Although this Court has recognized the states' interest in requiring abortion providers to keep *basic statistical information* about their patients in a manner that "properly respect[s] a patient's confidentiality and privacy," *Planned Parenthood v. Casey*, 505 U.S. 833, 900-01 (1992) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 80

(1976)), it has never recognized a state interest in unfettered access to patients' unredacted medical records, much less such access without protection of patient confidentiality.

Third, the means employed by the State — giving DHEC inspectors free access to the unredacted medical records of all patients at regulated facilities without protecting the confidentiality of those records — is grossly disproportionate to any possible legitimate interest of the State. As the dissenting judge below recognized:

> In limited situations, the State might have a valid need to obtain a patient's identity in order to investigate anonymous complaints or to seek corroborating evidence. However, South Carolina's interest in obtaining patients' identifying information in those limited situations does not support the disclosure requirement in the Regulation, which gives the State access to information identifying *every* patient of *every* abortion clinic in the State.

A32 (King, J., dissenting) (emphasis in original). If DHEC wishes to review the complete medical record of a patient who has filed a complaint, it can simply request the patient's consent to such disclosure. If DHEC cannot obtain that consent and it wishes to access the medical record of a particular patient for a good reason, DHEC can seek a warrant to do so. Thus, just as in *Thornburgh*, "[t]he scope of the information required ... belie[s] any assertions by the [state] that it is advancing any legitimate interests." *Thornburgh*, 476 U.S. at 766.[12]

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[12] The court below wholly failed to consider whether the disclosure of such confidential information *to the State* denies women's right to informational privacy, regardless of any *public* disclosure. In this respect, the opinion below conflicts with *Whalen* and the decisions of numerous circuit courts, all of which explicitly recognize that disclosure *to the state* may itself implicate privacy interests. *Whalen*, 429 U.S. at 602; *see also,*

Finally, the State has failed to provide adequate safeguards against public disclosure of patients' private medical information because it permits disclosure of that information in licensing proceedings.[13] Those proceedings are open to the press and any other interested persons, including those who participate in activism against abortion patients and providers. *See* S.C. CODE ANN. § 1-23-600 (2002). Thus, due to the disclosure provision, "women seeking abortions in South Carolina have a great deal more to fear than stigma. The protests designed to harass and intimidate women entering abortion clinics, and the violence inflicted on abortion providers, provide women with ample reason to fear for their physical safety." A36 (King, J. dissenting); *see also supra* at 6-7; *cf. Thornburgh*, 476 U.S. at 767 n.12.[14] The threats to

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e.g., Lawall, 307 F.3d at 789-90 (holding that privacy right "applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public"); *Sterling v. Borough of Minersville*, 232 F.3d 190, 196-97 (3d Cir. 2000) (holding that a threat of disclosure of confidential information by government official violates individual's privacy right regardless of whether information is actually disclosed); *Ramie v. City of Hedwig Vill.*, 765 F.2d 490, 492 (5th Cir. 1985) (holding that "[t]he disclosure strand of the privacy interest ... includes the right to be free ... from the government inquiring into matters in which it does not have a legitimate and proper concern"). The *Whalen* Court held that such interests were not violated in that case because the required disclosure was much like that required by a prior law and commonly required in the provision of health care. *Whalen*, 429 U.S. at 602. This case presents a sharply different situation because women are not commonly required to reveal their abortion decisions to the state or to provide it with complete copies of their medical records.

[13] R. 61-12 also fails to direct DHEC officials to maintain patient confidentiality, despite the fact that other DHEC regulations include such directives. *See, e.g.*, S.C. CODE ANN. REGS. 61-91 § 1001(D) (2002).

[14] Confidentiality is also important here because the Regulation requires that patient records contain the name of a married abortion patient's husband and the name of a minor abortion patient's parents. R. 61-12 § 401(A)(1). If this information is disclosed, a patient's spouse or parents may learn that she has undergone an abortion. This Court has

patient confidentiality posed by the Regulation may also force women to delay their abortions, undergo illegal abortions or take other actions dangerous to their physical health. *See supra* at 6.

A balancing of these factors tips decidedly in favor of the abortion patients' privacy rights, making clear that the circuit courts' different approaches to informational privacy claims leads to very different results. Moreover, the Fourth Circuit's application of the minority approach in this case leads to an unprecedented result: neither this Court nor any court of appeals has previously upheld an abortion regulation that exposed abortion patients' identities to authorized public disclosure. *Cf., e.g., Casey*, 505 U.S. at 899 (upholding recordkeeping and reporting requirement under which "the identity of each woman who has had an abortion remains confidential"); *Danforth*, 428 U.S. at 80-81 (upholding recordkeeping and reporting requirement because it "properly respect[ed] a patient's confidentiality and privacy"); *Lawall*, 307 F.3d at 788-90 (upholding disclosures to courts in judicial bypass proceedings because the challenged abortion statute explicitly required that the proceedings be confidential and not be made public). It is critical that the Court address this conflict and clarify this area of the law so as to bring uniformity to the federal courts' decision regarding the right to informational privacy.

II. By Rejecting DHEC's Interpretation of the Clergy Provision and Permitting the State to Coerce Participation in Religion, the Decision Below Conflicts With Decisions of this Court and the Courts of Appeals.

The majority's analysis of Plaintiffs' Establishment Clause claim conflicts with the decisions of this Court and

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recognized the prospect of harm that may result from notifying a woman's husband or a minor's parents of her abortion. *Casey*, 505 U.S. at 897; *Bellotti v. Baird*, 443 U.S. 622, 647 (1979).

the Courts of Appeals in three respects. First, the majority erroneously applied the *Salerno* standard to this claim, A9, A12-13; *see United States v. Salerno*, 481 U.S. 739, 745 (1987), despite the fact that this Court analyzes facial Establishment Clause challenges under a less onerous standard, *see, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313-14 (2000). Second, the majority's construction of the clergy provision violates principles of statutory construction and federalism. Finally, the clergy provision, as interpreted by the State, compels abortion providers to support and participate in religion.

A. The Majority Imposed an Impermissible Construction on the Clergy Provision.

DHEC has interpreted the clergy provision to require that abortion providers establish ongoing consulting agreements with clergy so that those clergy are immediately available should the physician wish to refer a patient to them. *Supra* at 5. According to DHEC, abortion providers must make those arrangements with clergy of two or three different denominations, at least one of which must be Protestant. *Id.* DHEC inspectors will then evaluate whether a facility's consulting arrangements and choice of clergy adequately satisfy the Regulation. *Id.* These agency interpretations of the Regulation were presented at trial by George Moore, who is Director of Outpatient and Home Care in DHEC's Division of Licensing, as well as the principal drafter of the Regulation.[15] DHEC and the other State defendants have stood by these interpretations throughout this litigation,[16] defending

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[15] Notably, when the Regulation took effect in October, 2001, it was Mr. Moore, as the Director of Outpatient and Home Care, who was responsible for inspecting Plaintiffs' facilities and ensuring that they were in compliance with the Regulation.

[16] DHEC has never indicated to abortion providers any change in its position; nor has it ever published any contrary interpretation of the clergy provision.

the constitutionality of DHEC's construction of the clergy provision.

Despite this position of the State, the majority below adopted the following construction of the clergy provision:

> [Abortion clinics] are required only to have "arrangements" for referring patients to clergy "as needed." These arrangements might amount to no more than a list of clergy and other specialists or a readily accessible telephone book to consult as required by the needs of a particular patient. Since the need for a referral cannot be known until the patient requests a referral, the 'arrangement' cannot be made until then.

A11. The majority's interpretation not only conflicts with the reasonable interpretation of DHEC, the state agency that drafted and enforces the provision, but it was also expressly rejected by one DHEC inspector who testified that keeping the appropriate sections of a local telephone book on hand would not satisfy the Regulation. A127.[17]

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[17] The majority's construction is also plainly unreasonable. The regulatory language, which requires that "*arrangements shall be made* for consultation or referral services ... *to be available* as needed," R. 61-12 § 307 (emphasis added), cannot reasonably be construed to encompass the essentially passive act of keeping a phone book nearby so that patients can try to find phone numbers for clergy who may or may not be available. The majority's construction is also unreasonable to the extent that it holds that physicians need only make referrals to clergy when a patient requests one. Section 307 requires that physicians make arrangements for consultation "as needed" in: "obstetrics/gynecology, anesthesiology, surgery, psychiatry, psychology, clinical pathology and pathology, clergy, and social services." R. 61-12 § 307. Even a cursory review of this list makes clear that it is the physician, not the patient, who must assess when a referral is needed. If, for example, a referral to an anesthesiologist is appropriate for a particular patient and the physician fails to make a referral because the patient has not asked for one, the physician will likely have committed malpractice. By placing "clergy" in

The majority's complete disregard for DHEC's interpretation conflicts with numerous decisions of this Court and the courts of appeals, which uniformly require that a court give deference to the construction of a regulation by the agency charged with its enforcement so long as that interpretation is not plainly erroneous. *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Human Dev. Corp. v. United States Dep't of Health & Human Servs.*, 312 F.3d 373, 379 (8th Cir. 2002); *Bldg. Trades Employers' Educ. Ass'n v. McGowan*, 311 F.3d 501, 507 (2d Cir. 2002); *Macias v. N.M. Dep't of Labor*, 21 F.3d 366, 369-70 (10th Cir. 1994); *Rossetti Contracting Co., Inc. v. Brennan*, 508 F.2d 1039, 1042 (7th Cir. 1974); *see also* 1A NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 31.6 at 728 (6th ed. 2002).[18] This deference is particularly imperative where, as here, a *federal court* interprets a *state law* that has already been construed by the state agency charged with the law's administration. *Macias*, 21 F.3d at 369 (holding the need for deference "even more compelling" where a federal court is faced with a state agency's interpretation of a state statute); *see also Cuesnongle v. Ramos*, 835 F.2d 1486, 1504 (1st Cir. 1987) (Campbell, C.J., concurring) ("The principle ... that federal courts should not tell state agencies how to interpret state law, is a basic element of our system."); *Huggins v. Isenbarger*, 798 F.2d 203, 209 (7th Cir. 1986) (Easterbrook, J., concurring) ("A federal court owes still greater respect for a state agency's construction of state law"). The majority's approach violates these principles by "inexplicably ig-

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this list, DHEC has indicated that physicians must similarly assess patients' need for clergy referrals. *See Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) ("words grouped in a list should be given related meaning") (citations omitted).

[18] The South Carolina courts follow an analogous rule. *See, e.g., Brown v. S.C. Dep't of Health & Envtl. Control*, 560 S.E.2d 410, 414 (S.C. 2002); *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 564 S.E.2d 341, 346 (S.C. Ct. App. 2002).

nor[ing]" the agency's plainly "reasonable interpretation" and imposing a construction that is "plainly implausible." A37-38 (King, J., dissenting).

B. The Clergy Provision Violates the Establishment Clause by Forcing Abortion Providers to Support and Participate in Religion.

Basic to the Constitution's prohibition of the establishment of religion is the assurance that the "government may not coerce anyone to support or participate in religion." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Pursuant to this principle, this Court in *Lee* invalidated the performance of a nonsectarian prayer by a clergyman at a public school's graduation ceremony. *Id; see also Santa Fe*, 530 U.S. at 310-312 (invalidating student-led, student-initiated prayers at football games because they coerce students to participate in religious observances). The Seventh and Second Circuits have followed *Lee* in striking down prison programs in which inmates' sentences were affected by participation in substance abuse programs that stressed religion. *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1074-75 (2d Cir. 1996); *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996); *see also Ross v. Keelings*, 2 F. Supp. 2d 810, 816-18 (E.D. Va. 1998). Such programs run "afoul of the prohibition against the state's favoring religion in general over non-religion." *Kerr*, 95 F.3d at 480.

Like the state actions invalidated in *Weisman*, *Santa Fe*, *Kerr*, and *Warner*, the Regulation endorses religion by requiring support of and participation in religion. The clergy provision, as interpreted by DHEC, forces physicians to participate in religion by establishing formal relationships with clergy (including one Protestant), assessing patients' needs for religious counseling, and referring patients for such counseling. By these same means, the provision forces physicians to support religion, regardless of their own spiritual beliefs. It is axiomatic that a physician's referral carries with it an

implication of the physician's belief that the other provider offers a meritorious service or expertise that may assist the patient in preserving or improving her health. *Cf., e.g., Jennings v. Burgess*, 917 S.W.2d 790 (Tex. 1996) (referring physician can be held liable for failing to exercise reasonable care in making a referral); 2 LOUISELL & WILLIAMS, MEDICAL MALPRACTICE ¶ 16.05(1) (Mathew Bender & Co. 2001) (same). A physician's referral to "clergy" necessarily conveys the message that the physician believes that the particular religion or religious personnel, as well as religion in general, have the ability to help the patient's health.

The clergy provision goes far beyond the coercion struck down in *Weisman*, *Santa Fe*, *Kerr*, *Warner*, and *Ross*. Whereas those cases involved the state's inclusion of religious content in programs which plaintiffs planned to attend or were required to attend, South Carolina actually forces physicians to themselves include religious content within their medical practices in order to continue providing abortions. By upholding a Regulation that forces abortion providers to endorse religion generally, and Protestantism in particular, the decision below represents a substantial incursion on the religious freedoms recognized by this Court and the courts of appeals. *See* A42 (King, J., dissenting) (concluding that "[s]uch a referral requirement is unprecedented, and it should be recognized as unconstitutional"); A40 (stating that "[t]his mandatory affiliation ... appears to promote the religious mission of those institutions given referral arrangements"). Certiorari should be granted to resolve these conflicts.[19] *See* SUP. CT. R. 10(a), (c).

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[19] At a minimum, the question of whether the state can require individuals to affiliate with religious personnel, including Protestant personnel, is an important question of federal constitutional law that should be resolved by this Court. SUP. CT. R. 10(c).

III. The Regulation Denies Plaintiffs Due Process of Law By Making Abortion Facility Licensing Contingent Upon the Cooperation of Area Hospitals.

As described above, the Regulation requires, as a prerequisite for licensing, that physicians who provide abortions either have admitting privileges at a local hospital that has successfully sought state certification as an abortion provider, or have a documented transfer arrangement with such a hospital and a written consulting agreement with a physician who has admitting privileges at such a hospital. *See supra* at 5. In either case, the physician must obtain the cooperation of the local hospital, and in either case, the hospital must itself have successfully attempted to become certified by the State as an abortion provider. Nothing in the Regulation or South Carolina law prevents local hospitals from declining to apply for abortion certification or from denying a physician admitting privileges on the basis of the hospitals' opposition to abortion.[20] Thus the Regulation essentially grants hospitals the authority to prevent the licensing of abortion facilities for virtually any reason, including opposition to abortion. Such a delegation of veto power over abortion providers' licenses violates Plaintiffs' right to due process. *See, e.g., Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir. 1964) (holding that licensing decisions must be based upon established standards so that potential licensees are not subject to the uncontrolled discretion of those with licensing authority);

[20] Neither public nor private hospitals are subject to due process limitations in their decision whether to become certified as abortion providers. With respect to admitting privilege decisions, private hospitals in South Carolina are not subject to any due process limitations, *Modaber v. Culpeper Mem'l Hosp.*, 674 F.2d 1023 (4th Cir. 1982), and even in public hospitals, "due process requires only that a public hospital not exclude a physician from practice therein by rules or acts which are unreasonable, arbitrary, capricious or discriminatory," *Huellmantel v. Greenville Hosp. Sys.*, 402 S.E.2d 489, 492 (S.C. Ct. App. 1991). Notably, South Carolina law explicitly protects private hospitals that refuse to permit the performance of abortions in their facilities. S.C. CODE ANN. § 44-41-70 (2002).

see also Hallmark Clinic v. N.C. Dep't of Human Res., 380 F. Supp. 1153, 1158-59 (E.D.N.C. 1974) (three-judge district court) ("If the state is determined to utilize hospitals as a control factor for the protection of patients in freestanding abortion clinics then it must establish and enforce standards for admission to hospital staff privileges. To do otherwise is government by caprice and cannot withstand fourteenth amendment challenge.").

The majority rejected this claim on the sole ground that the challenged provisions have not yet prevented Plaintiffs from obtaining licenses. A9. This holding conflicts with decisions of this Court and the Fifth Circuit, which recognize that the delegation of standardless authority itself denies due process to the persons subject to that authority.[21] *See City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 677 (1976) (holding that due process is violated when "the delegation of legislative power, originally given by the people to a legislative body, ... [is] in turn delegated by the legislature to a narrow segment of the community"); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-23 (1928) (striking down ordinance permitting the establishment of homes for the aged in residential areas only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility because "the delegation of power so attempted is repugnant to the due process

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[21] The majority relied heavily upon an Eighth Circuit decision that did not involve abortion facility licensing. *Women's Health Ctr. of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989). The Eighth Circuit's holding rests on its erroneous equation of admitting privilege requirements with requirements that abortion providers hold a license to practice medicine. *Id.* The two types of requirements cannot be equated for due process purposes because professional licensing boards, unlike hospitals ruling on admitting privileges, must make their decisions on the basis of individual merit and cannot deny licenses on the basis of their own disfavor of lawful and constitutionally protected practices. *See, e.g., Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238-39 (1957).

clause"); *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1110 (5th Cir. 1997) (striking down a delegation of standardless veto power over minors' abortions to judges, and explaining that "this discretion itself, and not the exercise of it" is unconstitutional); *see also Birth Control Ctrs., Inc. v. Reizen*, 508 F. Supp. 1366, 1374-75 (E.D. Mich. 1981) (invalidating similar requirement "[e]ven though plaintiff clinics encountered no problems in obtaining ... transfer agreements," because the constitutional "defect lies in the delegation of unguided power to a private entity"), *aff'd in part & vacated in part on other grounds*, 743 F.2d 352 (6th Cir. 1984); *Hallmark*, 380 F. Supp. at 1158-59 (striking down a similar requirement that abortion providers have hospital transfer agreements or admitting privileges because that delegation had the "potential for arbitrariness"). Because the opinion below interprets the requirements of due process in a way that conflicts with decisions of this Court and various courts of appeals, certiorari should be granted.[22] *See* SUP. CT. R. 10(a), (c).

IV. The Majority Erroneously Applied the *Salerno* Standard to Plaintiffs' Vagueness Challenge and Upheld Hopelessly Vague Provisions.

The majority rejected Plaintiffs' vagueness claims under the stringent "no set of circumstances" test set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987). *See* A9, A17-19.[23] This approach conflicts with this Court's decision in

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[22] The issue of whether a standardless delegation of government authority violates due process regardless of the improper exercise of the delegated authority is also an important question of federal constitutional law that should be resolved by this Court. SUP. CT. R. 10(c).

[23] The majority also erroneously implies that purported similarities between the Regulation's requirements and guidelines of the American College of Obstetricians and Gynecologists are relevant to the court's vagueness analysis. This is clearly incorrect for the guidelines referenced are not law, are non-binding, and are "general and intended to be adapted to many different situations." A153.

Kolender v. Lawson, which held that the *Salerno* standard does not apply in a vagueness challenge to a law that reaches constitutionally protected conduct or imposes criminal penalties. *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983) (rejecting contention that statute should not be held vague on its face unless it is vague in all its applications); *see also, e.g., Houston v. Hill*, 482 U.S. 451, 458-59 (1987); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982); *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Planned Parenthood v. Farmer*, 220 F.3d 127, 135 (3d Cir. 2000); *United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988). Because the Regulation governs constitutionally protected conduct and imposes criminal penalties,[24] the majority's application of *Salerno* was plainly incorrect.

Section 103(c) of the Regulation must be stricken under the applicable standard of vagueness review. That provision subjects abortion providers to penalties for failing to comply with "best practices" that have not been promulgated, written down or articulated in any form, but will instead be defined by DHEC inspectors on a case-by-case basis.[25] The term "best practices" can be interpreted by DHEC inspectors to include limitless requirements with which abortion providers must comply in order to avoid sanctions. This is the epitome of a vague law. The fact that a DHEC inspector will articulate the requirements of such "best practices" when ordering compliance with them does not remedy the constitutional infirmity. As this Court held in *City of Chicago v. Morales*, a standardless prohibition is not cured by the fact that law enforcement will later "fill in" the content of the prohibition. 527 U.S. 41, 56-60 (1999). Thus, § 103(c) fails to give fair

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[24] *See* S.C. CODE ANN. § 44-7-340 (2002).

[25] The majority's assumption that this provision merely allows DHEC to promulgate new regulations is contrary to DHEC's position that inspectors will define "best practices" on a "case by case basis" and can cite a provider for a Class III violation if he or she is not in compliance with a best practice defined by a DHEC inspector. A141-142.

notice of the conduct it prohibits and lacks standards to prevent arbitrary or discriminatory enforcement, and the decision below conflicts with this Court's decisions in *Morales*, 527 U.S. 41, *Hoffman Estates*, 455 U.S. at 498-99, *Colautti*, 439 U.S. at 391, and *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Certiorari should be granted to resolve these conflicts. *See* SUP. CT. R. 10(a), (c).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

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